

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP,)
 a Montana limited partnership;)
 PLAINS GRAINS INC., a Montana corporation;)
 ROBERT E. LASSILA and EARLYNE A.)
 LASSILA; KEVIN D. LASSILA and)
 STEFFANI J. LASSILA; KERRY ANN)
 (LASSILA) FRASER; DARYL E. LASSILA)
 and LINDA K. LASSILA; DOROTHY LASSILA;)
 DAN LASSILA; NANCY LASSILA)
 BIRTWISTLE; CHRISTOPHER LASSILA;)
 JOSEPH W. KANTOLA and MYRNA R.)
 KANTOLA; KENT HOLTZ; HOTLZ FARMS,)
 INC., a Montana corporation; MEADOWLARK)
 FARMS, a Montana partnership; JON C.)
 KANTOROWICZ and CHARLOTTE)
 KANTOROWICZ; JAMES FELDMAN and)
 COURTNEY FELDMAN; DAVID P. ROEHM)
 and CLAIRE M. ROEHM; DENNIS N. WARD)
 and LaLONNIE WARD; JANNY KINION-MAY;)
 C LAZY J RANCH; CHARLES BUMGARNER)
 and KARLA BUMGARNER; CARL W.)
 MEHMKE and MARTHA MEHMKE; WALTER)
 MEHMKE and ROBIN MEHMKE; LOUISIANA)
 LAND & LIVESTOCK, LLC., a limited liability)
 corporation; GWIN FAMILY TRUST,)
 U/A DATED SEPTEMBER 20, 1991;)
 FORDER LAND & CATTLE CO.; WAYNE W.)
 FORDER and DOROTHY FORDER;)
 CONN FORDER and JEANINE FORDER;)
 ROBERT E. VIHINEN and PENNIE VIHINEN;)
 VIOLET VIHINEN; ROBERT E. VIHINEN,)
 TRUSTEE OF ELMER VIHINEN TRUST;)
 JAYBE D. FLOYD and MICHAEL E. LUCKETT,)
 TRUSTEES OF THE JAYBE D. FLOYD LIVING)
 TRUST; ROBERT M. COLEMAN and HELEN)
 A. COLEMAN; GARY OWEN and KAY OWEN;)

FILED

APR 02 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; MICHAEL E. HOY; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees.

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

On appeal from the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

**SECOND MOTION TO DISMISS APPEAL ON GROUNDS OF
MOOTNESS**

APPEARANCES:

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*Attorneys for Appellees/Cross-
Appellants Southern Montana and
Urquharts*

MOTION TO DISMISS ON GROUNDS OF MOOTNESS

Appellees/Cross-Appellants Southern Montana Electric Generation and Transmission Cooperative, Inc. (Southern Montana) and the Urquharts move the Court, for a second time, to dismiss this appeal on grounds of mootness. The present challenge to Appellee Cascade County's rezoning of the Urquharts' property, approved in March of 2008, is moot because there has been no appeal, by the March 1, 2010 appeal deadline, of the subsequent county-wide rezoning adopted on August 28, 2009. This Court is requested to take judicial notice that no appeal has been filed in the Montana Eighth Judicial District Court, Cascade County. The 2009 county-wide rezone is now final and non-appealable and the prior 2008 rezoning of the Urquharts' property at issue in this appeal is moot. Since the county-wide rezoning is now final and non-appealable. Southern Montana and the Urquharts move for Dismissal on grounds of mootness.

SUPPORTING MEMORANDUM

Following oral argument on November 18, 2009, the Court issued its Order directing the parties to submit supplemental briefs, within thirty days, on the issue of how the county-wide rezone, adopted by Cascade County in August of 2009, affected the spot zoning claim advanced by Appellants Plains Grains, *et al.* This matter was fully briefed, in December of 2009, as ordered by the Court. Southern Montana, the Urquharts and Cascade County argued in the supplemental briefing

that this appeal is moot due to the 2009 county-wide rezone.

Since filing of the supplemental briefs by the parties, the appeal period for the county-wide rezone passed, with no appeal having been filed. Because no appeal was filed challenging the 2009 county-wide rezone, by the March 1, 2010 appeal deadline, the county-wide rezone is final. The county-wide rezone thus takes precedence over and effectively moots the earlier 2008 rezone of the Urquharts' property at issue in this litigation. Accordingly, the Court should summarily dismiss the appeal on grounds of mootness.

It is a well-established principle in Montana law that mootness is a threshold issue. In *Povsha v. City of Billings*, 2007 MT 353, ¶ 19, 340 Mont. 346, 174 P.3d 515 (internal citations omitted and emphasis added), this Court re-iterated the rule that mootness must be addressed prior to ruling on the merits of the issues presented in the appeal.

Mootness is a threshold issue which must be resolved before addressing the underlying dispute. This Court has consistently held that "a moot question is one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy." Moreover, a case will become moot for the purposes of an appeal "where by a change of circumstances prior to the appellate decision the case has lost any practical purpose for the parties, for instance where the grievance that gave rise to the case has been eliminated...."

As discussed in the supplemental brief filed by Southern Montana and the Urquharts, as well as the County's supplemental brief, the case of *Country*

Highlands Homeowners Assoc., Inc. v. Bd. of County Comms. of Flathead

County, 2008 MT 286, 345 Mont. 379, 191 P.3d 424, is controlling. This decision dictates that the appeal is moot by virtue of the 2009 county-wide rezone. In addition, as also discussed in the supplemental briefing filed by Southern Montana and the Urquharts, and the County, the exception to mootness for constitutional issues which are capable of repetition yet avoid review does not apply. These legal principles, on the issue of mootness, continue to apply to the present motion. Thus, additional briefing on these *legal* points is not undertaken in this brief, in order to avoid duplication of legal argument which remains the same.

This second request for dismissal on grounds of mootness is brought to alert the Court to a recent *factual* development, or change of circumstances, of consequence to the appeal and the issue of mootness: no appeal of the county-wide rezone was filed by the March 1, 2010 appeal deadline. The appeal deadline is determined under MCA Section 76-2-202(1)(b) (emphasis added), which states:

An action challenging the creation of a zoning district or adoption of zoning regulations must be commenced within **6 months** after the date of the order by the board of county commissioners creating the district or adopting the regulations.

This statute is effective as of May 5, 2009. Mont. Laws 2009, ch. 446, Section 6.

In this case, the county-wide rezoning resolution, Resolution No. 09-82, titled "Final Resolution Amending Sections 1 Through 5 and Sections 7 Through 16 of the Cascade County Zoning Regulations and the Cascade County District

Zoning Map,” is dated August 28, 2009. The Resolution is attached at Exhibit 1. Under MCA Section 76-2-202(1)(b), the deadline to file a legal challenge in district court to the county-wide rezone was 6 months from August 28, 2009, which was March 1, 2010. (February 28, 2010 lands on a Sunday). No legal challenge was filed by the March 1, 2010 appeal deadline; therefore the county-wide rezone is final. Review of the District Court’s 2008 ruling affirming the application for rezoning is unnecessary. The Court should therefore summarily dismiss the appeal.

Southern Montana and the Urquharts, as well as the County, are entitled to the dismissal of the appeal. Throughout the course of the rezoning process (which started in 2006 with the filing of the first rezoning application) and the related litigation, Plains Grains has sat on certain of its legal rights, while continuing to challenge development by Southern Montana of the Highwood Generating Station (HGS). In particular, in this litigation, Plains Grains never sought a stay or an injunction of the 2008 rezoning decision. This failure to act moots this appeal and is the basis for the first motion to dismiss brought by Southern Montana and the Urquharts.

More recently, Plains Grains had notice of the county-wide rezone by multiple publications and by virtue of this appeal, but completely failed to avail itself of the appeal process provided by statute. Meanwhile, Southern Montana has

moved forward with the development of HGS as a natural gas powered generating facility, having secured financing for the project, ordered equipment and put out for bid construction work.

The county wide rezone of 2009 is thus finally effective and cannot be undone in this litigation and the Court should dismiss the appeal for this reason.

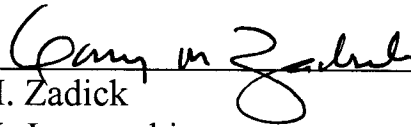
Opposing counsel, Roger M. Sullivan, objects to this motion.

RELIEF REQUESTED

Appellees/Cross-Appellants Southern Montana and the Urquharts request the Court to dismiss this appeal as moot. An Order granting the motion is enclosed. Mont.R.App.P. 16(1).

DATED this 1 day of April, 2010.

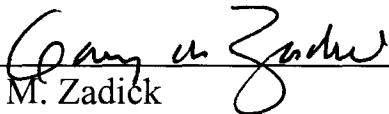
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By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is printed with a proportionately spaced Times New Roman test typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is not more than 1250 words, excluding certificate of service and certificate of compliance.

DATED this 1 day of April, 2010.



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Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the respective attorneys for each of the parties entitled to service by depositing a copy in the United States mails at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

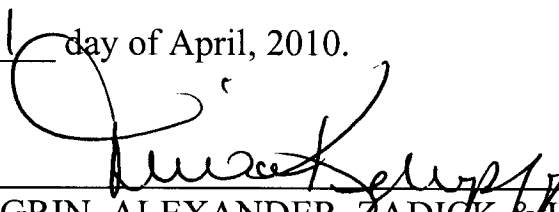
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DATED this 1 day of April, 2010.



UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.

Resolution 09-82

**FINAL RESOLUTION AMENDING
SECTIONS 1 THROUGH 5 AND
SECTIONS 7 THROUGH 16 OF THE
CASCADE COUNTY ZONING REGULATIONS
AND THE CASCADE COUNTY DISTRICT ZONING MAP**

WHEREAS, under the provisions of Title 76, Chapter 2, Part 2, Montana Code Annotated, the Board of County Commissioners is authorized to adopt zoning regulations; and

WHEREAS, a Zoning District and Regulations therefore was created by Resolution passed by the Board of County Commissioners on April 26, 2005, as documented on Resolution 05-018 on file in the Office of the Clerk and Recorder of Cascade County; and

WHEREAS, Montana Code Annotated § 76-2-205 allows the Board of County Commissioners to amend zoning regulations; and

WHEREAS, in accordance with Section 76-2-204, Montana Code Annotated, and Section 14 of the Cascade County Zoning Regulations, the Board of County Commissioners shall require the County Planning Board to act as a zoning commission to recommend boundaries and appropriate regulations for the various zoning districts; and

WHEREAS, the Cascade County Planning Board is performing in an advisory capacity to the Board of County Commissioners regarding zoning and has provided a written report to the County Commissioners regarding the above-mentioned rezoning application; and

WHEREAS, the Cascade County Planning Board, after a public meeting and public hearing held on April 21, 2009, and a public meeting on May 19, 2009, which were properly noticed by legal advertisements printed in the Great Falls Tribune on April 5 and 12, 2009 and at the April 21 hearing, did on May 19, 2009, recommend to the Board of County Commissioners passing of the amendments to the Cascade County Zoning Regulations and the Cascade County District Zoning Map; and

WHEREAS, the Cascade County Commissioners held a public hearing on July 14, 2009 after legally noticing the public hearings in the Great Falls Tribune on May 24, May 31, June 7, June 14, June 21, June 28, July 5, and July 12, 2009, and passed a resolution of intent to amend the Cascade County Zoning Regulations and the Cascade County District Zoning Map; and

WHEREAS, on July 18, July 19, and July 26, the Board of County Commissioners did cause to be published in the Great Falls Tribune a "Public Notice of Passage of Resolution of Intention to Amend the County Zoning Regulations and the County District Zoning Map"; and

WHEREAS, THE Public Notice established and provided for a thirty (30) day protest period for receipt of written protest by the Board of County Commissioners; and



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Cascade County, Rina Ft Moore - Clerk & Recorder



WHEREAS, there has not been sufficient protest to prevent the amending of the County Zoning Regulations and the County District Zoning Map as herein described,

NOW, THEREFORE BE IT RESOLVED by the Board of County Commissioners of Cascade County as follows:

There is hereby passed this final resolution amending sections 1 through 5, sections 7 through 16 of the Cascade County Zoning Regulations and the Cascade County District Zoning Map. This resolution shall take effect and be in full force as of the date set forth herein below.

Dated this 28 day of Aug, 2009.

BOARD OF COUNTY COMMISSIONERS
OF CASCADE COUNTY



Joe Briggs, Chairman

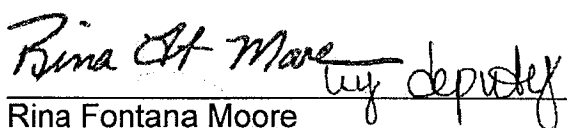


Peggy Beltrone, Commissioner



Bill Salina, Commissioner

Clerk and Recorder Attest



Rina Fontana Moore
Cascade County Clerk & Recorder



MBSickels

